

Third Amended Draft Of Section 15 After Review Of Public Comment

SECTION 15 -- Unfair Cigarette Sales

15.1 WHOLESALEERS' COST OF DOING BUSINESS

A. COST OF DOING BUSINESS

1. The cost of doing business is presumed to be four percent (4%) of the basic cost of cigarettes to the wholesaler unless a different cost of doing business is determined by a cost study conducted by the director.
2. Unless approved for a lower cost of doing business or meeting competition, as provided by this regulation and the Unfair Cigarette Sales Act, or falling within the statutory exceptions in A.C.A. §4-75-703, the wholesaler may not advertise, offer to sell, or sell cigarettes to a retailer at less than the basic cost of the cigarettes involved to the wholesaler, plus the wholesaler's statutorily presumed four percent (4%) cost of doing business, if the wholesaler does so with the intent to injure competitors or destroy or substantially lessen competition. Evidence of advertisement, offering to sell, or sale of cigarettes at a price less than the cost of the cigarettes involved to the wholesaler, plus the wholesaler's cost of doing business shall be prima facie evidence of intent to injure competitors and destroy or substantially lessen competition.

B. WHEN TO FILE APPLICATION

1. A wholesaler who wishes to advertise, offer for sale, or sell at less than four percent (4%) presumed cost of doing business shall submit an application to the director, for approval by the Board, at least forty five (45) days before the desired effective date;
2. Or other times as may be authorized by the director.

C. APPLICATION TO CONTAIN CERTAIN INFORMATION

1. An application for permission to advertise, offer for sale, or sell at less than four percent (4%) presumed cost of doing business shall contain;
 - a. A summary of expenses associated with the business, on a form to be provided by the director, with the cigarette portion of the

business separately listed, and using the information set forth in the most recently filed federal income tax return.

- b. The certificate statement signed by the owner, partner, or a responsible corporate officer indicating that the summary of expenses as contained on the form required by § C(1)(a) of this rule is true and accurate;
 - c. A statement signed by a certified public accountant indicating the CPA has reviewed the information provided and that it accurately reflects the information shown in all material respects;
 - d. A copy of the most recently filed federal income tax return form with all associated schedules and attachments; and
 - e. Any other information requested by the director, as may be necessary to review the application.
2. If the wholesaler engages the services of an independent accounting firm, the statement provided under § C(1)(c) of this regulation shall be signed by a CPA associated with that firm.

D. REVIEW AND DETERMINATION

The director shall review and evaluate the information provided by the wholesaler and shall make a recommendation to the Board regarding the approval of the wholesaler's application to sell at less than the statutory presumed cost of doing business. The director shall inform the applicant of his recommendation prior to submitting the application, and the director's recommendation, to the board. The director shall notify the wholesaler of the final action on the application, and, if approved, the specified percentage cost of doing business approved shall remain in affect until the next application and approval or until withdrawn by the director. If a person with permission to sell at less than statutory presumed cost of doing business fails to submit a new application by May 15, then the permission previously given shall be automatically withdrawn on July 1.

E. MEETING COMPETITION

A wholesaler may advertise, offer for sale, or sell at a lower cost of doing business while meeting competition. The following criteria shall be considered when meeting competition.

- 1. The competitor shall have been approved for a lower cost of doing business in accordance with this regulation; or

2. The competitor shall have sold, or made a definite bonafide advertisement or offer to sell cigarettes at a lower price to a specific retailer; and
3. A written offer to sell is considered prima facie evidence of competition at a particular retailer.

F. REMEDY

Not with standing approval by the director and the board of a lower cost of doing business, an effected party who claims to be injured may pursue remedies in a court of competent jurisdiction as provided by Ark. Code Ann. § 4-75-713.

15.2 **RETAILERS' COST OF DOING BUSINESS**

A. COST OF DOING BUSINESS

1. The cost of doing business is presumed to be seven and one/half percent (7.5%) of the basic cost of cigarettes to the retailer, unless a different cost of doing business is determined by a cost study conducted by the director.
2. Unless approved for a lower cost of doing business or meeting competition, as provided by this regulation and the Unfair Cigarette Sales Act, or falling within the statutory exceptions in A.C.A. §4-75-703, the retailer may not advertise, offer to sell, or sell cigarettes to a retail consumer at less than the basic cost of the cigarettes involved to the retailer plus the retailer's statutorily presumed seven and one/half percent (7.5%) presumed cost of doing business, if the retailer does so with the intent to injure competitors or destroy or substantially lessen competition. Evidence of advertisement, offering to sell, or sale of cigarettes at a price less than the cost of the cigarettes involved to the retailer, plus the retailer's cost of doing business shall be prima facie evidence of intent to injure competitors and destroy or substantially lessen competition.

B. WHEN TO FILE APPLICATION

1. A retailer who wishes to advertise, offer for sale, or sell at less than seven and one-half percent (7.5%) presumed cost of doing business shall submit an application to the director for approval by the Board, at least forty five (45) days before the desired effective date;
2. Or other times as may be authorized by the director.

C. APPLICATION TO CONTAIN CERTAIN INFORMATION

1. An application for permission to advertise, offer for sale, or sell at less than seven and one-half percent (7.5%) presumed cost of doing business shall contain;
 - a. A summary of expenses associated with the business, on a form to be provided by the director, with the cigarette portion of the business separately listed, and using the information set forth in the most recently filed federal income tax return.
 - b. The certificate statement signed by the owner, partner, or a responsible corporate officer indicating that the summary of expenses as contained on the form required by § C(1)(a) of this rule is true and accurate;
 - c. A statement signed by a certified public accountant indicating the CPA has reviewed the information provided and that it accurately reflects the information shown in all material respects;
 - d. A copy of the most recently filed federal income tax return form with all associated schedules and attachments; and
 - e. Any other information requested by the director, as may be necessary to review the application.
2. If the retailer engages the services of an independent accounting firm, the statement provided under § C(1)(c) of this regulation shall be signed by a CPA associated with that firm.

D. REVIEW AND DETERMINATION

The director shall review and evaluate the information provided by the retailer and shall make a recommendation to the board regarding the approval of the retailer's application to sell at less than the statutory presumed cost of doing business. The director shall inform the applicant of his recommendation prior to submitting the application, and the director's recommendation, to the board. The director shall notify the retailer of the

final action on the application, and, if approved, the specified percentage cost of doing business approved shall remain in affect until the next application and approval or until withdrawn by the director. If a person with permission to sell at less than statutory presumed cost of doing business fails to submit a new application by May 15, then the permission previously given shall be automatically withdrawn on July 1.

E. MEETING COMPETITION

A retailer who has not be approved for a lower cost of doing business may advertise, offer for sale, or sell at a lower cost while meeting competition. The following criteria shall be considered when meeting competition:

1. The competitor shall have been approved for a lower cost of doing business in accordance with this regulation; or
2. The competitor shall have sold, or made a definite bonafide advertisement or offer to sell, cigarettes at a lower price to a specific individual; and
3. A written offer to sell is considered prima facie evidence of competition to a particular individual.

F. REMEDY

Not with standing approval by the director and the board of a lower cost of doing business, an effected party who claims to be injured may pursue remedies in a court of competent jurisdiction as provided by Ark. Code Ann. § 4-75-713.

15.3 **COUPONS AND MANUFACTURER PROMOTIONAL ALLOWANCES**

A. APPLICATION OF MANUFACTURER PROMOTIONAL ALLOWANCES

For purposes of Ark. Code Ann. § 4-75-709, a manufacturer promotional allowance for a particular brand style of cigarette may only be passed on to the purchaser by the wholesaler or retailer in a transaction involving that particular brand style of cigarette. A wholesaler or retailer may not apply manufacturer promotional allowances in a sale involving a brand style of cigarette other than the particular brand style of cigarette for which that manufacturer promotional allowance was given by the manufacturer.

B. NO ACCRUAL OF MANUFACTURER PROMOTIONAL ALLOWANCES

For purposes of Ark. Code Ann. § 4-75-709, manufacturer promotional allowances may not be accrued and applied in the aggregate, but must be applied only on the same gross or pro rata basis as they are provided by the manufacturer. For example, if a manufacturer provides a manufacturer promotional allowance of twenty cents per carton of a particular brand style, that manufacturer promotional allowance may only be passed on to the purchaser by the Wholesaler at the rate of twenty cents per carton, or a pro rata portion thereof per pack from the carton, for the particular brand style of cigarette for which it is provided by the manufacturer.